order to execute the consent judgment. The appellant responded by filing an action in the same court to set aside the consent judgment on the grounds of fraud, misrepresentation and undue influence. She also applied for the stay of the execution of writ of possession.

On November 2, 1983 the Magistrate allowed the respondents' application for leave to issue writ of possession and at the same time refused the appellant's application for the stay of the writ. As a result the appellant appealed to the High Court against the decision of the learned Magistrate, and in addition she applied by an *ex parte* Originating Motion to the High Court to stay the writ. Mohamed Yusof J. who heard the Originating Motion refused the appellant's application and gave no reason for so doing. It appears that he was unhappy at the absence of counsel for the appellant when the motion came before him. Now the appellant appeals to us against that decision.

From the narration of these facts there are now still two proceedings pending between the parties concerning this portion of the premises; first the appellant's civil action in the Magistrate court to set aside the consent judgment and secondly the appellant's appeal in the High Court against the order of the Magistrate granting leave to issue writ of possession.

Obviously the multiplicity of the proceedings which were started by the appellant concerns a basic issue relating to the nature and scope of the consent judgment. Whilst it is the contention of the appellant that the consent judgment was not absolute but conditional upon the respondents' obtaining a decontrol certificate in respect of the premises, the respondent's contention is that the appellant had breached the consent judgment by occupying a bigger portion than what she had done previously. However, in the present appeal we are not concerned with either of those issues. We are only concerned to see whether the rejection of the appellant's Originating Motion to stay the issue of the writ of possession by Mohamed Yusof J. was a proper exercise of discretion. As to this we are informed by counsel that the appellant has already vacated the premises and rented another premises paying a fairly high rent. Counsel for the respondents informed us that they were prepared to let the appellant occupy the portion formerly occupied by her provided that she does not extend her occupation to other parts not occupied by her previously. Counsel for the appellant disputed this statement.

In view of this information it seems to us that the difference between the parties is whether the appellant was breaking the consent judgment by occupying a space bigger than what she had occupied previously. In our judgment, since the appellant has already vacated the premises, an order to stay execution is completely academic, and does not in any way prejudice the appellant in pursuing her suit to set aside the consent judgment. Should she win, she could always be restored or entitled to damages unless a decontrol certificate is obtained. Counsel for the appellant informed us that he apprehended that a decontrol certificate would be granted now that the appellant is out of the premises. As to this we are not in a position to restrain the Rent Control Tribunal from issuing the certificate in the present proceedings. This matter is completely irrelevant for the purpose of this appeal, although it may have an important bearing in other proceedings or elsewhere.

Hence, we dismissed the appeal with costs and we ordered that the deposit be paid to the respondents as agreed costs.

Appeal dismissed.

Solicitors: *Peter & Co.; C.C. Aiyathurai & Co.*

ABDUL SAMAD BIN HAJI ALIAS & ANOR. v. PUBLIC BANK & ANOR.

[F.C. (Salleh Abas L.P, Wan Suleiman & Hashim Yeop A. Sani F.JJ.) September 3 & October 3, 1984]

[Johor Bahru – Federal Court Civil Appeal No. 100 of 1983]

Practice & Procedure – Winding up – Receivers – Excess amount paid into court – Garnishment Order – Claim by Director-General of Customs – Application to court by receivers – Functus officio – R.H.C. 1980, O. 49 r. 6.

Company Law – Winding-up – Receivers – Garnishment Order – Claim by Director-General of Customs – Application to court by receivers – Functus officio.

In this case the appellants were appointed receivers and managers of a debtor company. A sum of $38.702.66 was paid into the debtor company's account being excess amount after realisation of assets and settlement of costs of realisation and amounts owing to secured creditors. Claims were made by the respondents and a garnishment order was obtained. The money was paid into court on November 23, 1982. Upon being appointed receivers and managers the appellant gave notice of their appointment to

the Director-General of Customs for any claims for unpaid sales tax or customs duty. It was only on November 26, 1982 that the appellants received a letter from the Director of State Customs, Sales Tax Branch, that the debtor company, was owing a sum of $41,511.12 as unpaid sales tax. The appellants therefore applied to the court praying that the amount deposited be paid to the Director of Customs. Notice was given to all concerned in the garnishment and to the Director of State Customs Sales Tax Branch. When the matter came on for hearing before the Judicial Commissioner neither the Director General of Customs nor his representative was present. The learned Judicial Commissioner held that the appellants were *functus officio* as receivers and managers. He made an order to pay out the sum in court to the respondents and costs. The appellants appealed. The main issues were (a) whether the learned Judicial Commissioner was wrong in not taking any step under Order 49 rule 6 of the Rules of the High Court, 1980 and (b) whether the learned Judicial Commissioner was wrong in holding that the appellants were *functus officio.*

Held: (1) as the customs did not respond to the notice sent to them, no order could in any case have been made in their favour under Order 49 rule 6;

(2) the appellants were former receivers and the court was perfectly entitled to hear the appellants on any matter concerning the distribution of the money subject of the garnishment order. Counsel had however no *locus standi* to represent the Director-General of Customs;

(3) the court has a discretion to make an order or not under Order 49 rule 6 as it is an exercise of an equitable power. In the circumstances of this case it was not wrong for the learned Judicial Commissioner to have made the order as he did.

Case referred to:

(1) *Roberts* v. *Death* (1882) 8 Q.B.D. 319.

FEDERAL COURT.

A. Kanesalingam for the appellants.
Derek G. Thambyah for the 1st respondent.
Nagarajah Muthiah for the 2nd respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court): The appellants were appointed receivers and managers of Koford Paper Industries Sdn. Bhd., judgment debtor, by Messrs. Kwong Lee Bank Bhd. secured creditors pursuant to the terms of a debenture dated June 3, 1978. A sum of $38,702.66 was subsequently paid into the debtor company's account being excess amount after realisation of assets and settlement of costs of realisation and amounts owing to secured creditors. A garnishment order dated July 31, 1982 was obtained at the instance of the first respondent, Public Bank Bhd. The other claimant was the Intervenor (MIDF) whose application to intervene had been allowed. On November 23, the said sum was paid into court.

Upon being appointed receivers and managers, the appellants gave due notice of their appointment to the Director-General of Customs for any claims for unpaid sales tax or customs duties. On November 26, 1982 the appellants received a letter dated November 23, 1982 from the Director of State Customs, Sales Tax Branch, Kuala Lumpur notifying the appellants that Koford Paper Industries Sdn. Bhd. was still owing the government a sum of $41,511.12 as unpaid sales tax for period November 1976 to October 1979. The letter cited section 70(1) and (2) of the Sales Tax Act, 1972 [Act 64] which reads as follows:-

"70.(1) Where a receiver is appointed of the property of a licensed manufacturer the receiver shall give notice thereof to the Director General within fourteen days thereafter, and shall before disposing of any of the assets of the licensed manufacturer set aside such sum out of the assets as appears to the Director General to be sufficient to provide for any sales tax that will thereafter become payable in respect of the goods that have been sold or manufactured by the licensed manufacturer before the appointment of the receiver.

(2) A person appointed as receiver who fails to give notice to the Director General within the time specified in sub-section (1) or fails to provide for payment of the sales tax as required by that sub-section shall be personally liable for any sales tax that is or becomes payable as aforesaid."

The letter from the Customs ended with a notice to the appellants to settle the amount within fourteen days from the date of the receipt of the letter in default legal action under the Sales Tax Act, 1972 would be taken. According to the learned Judicial Commissioner this letter from the Customs was written more than four years after the appellants had notified the Customs of the appointment but we are unable to find a copy of the notice in the record of appeal.

Be that as it may the appellants must have been alarmed by the notice from the Customs and their solicitors wrote a letter to the Senior Assistant Registrar, High Court, Johor Bahru on December 23, 1982 the material parts of which read as follows:-

"Our clients were formerly the receivers and managers of Koford Paper Industries Sdn. Bhd. We are instructed that

pursuant to a garnishment in Civil Suit No. 8 of 1980 in the High Court at Johore Bahru and Civil Action 178 of 1981 in the Magistrate's Court at Kuala Lumpur a sum of money has been paid to you to be paid out to some creditors of the defendant company.

Our clients have now received a claim for $41,511.12 being sales tax from the Department of Customs which is a claim ranking in priority to the claims by other creditors.

Kindly stop payment of any monies to other creditors and please settle the sales tax claimed by the Department of Customs Kuala Lumpur."

There was also an affidavit sworn on December 22, 1982 by the appellants stating the history of the garnishment proceeding and a prayer that the amount deposited in court be paid to the Director General of Customs in settlement of the debt as aforesaid. Apparently as a result of this letter the court set down the matter of the garnishment proceeding in Civil Suit No. 8/1980 for hearing on 12th-15th March 1983 vide High Cout notice dated January 2, 1983. This notice was addressed to all concerned in the garnishment and also to the Director of State Customs, Sales Tax Branch, Kuala Lumpur who had sent the notice to the appellants earlier. When the matter came before the learned Judicial Commissioner on March 12, 1983 neither the Director General of Customs nor his representative was present.

The Judicial Commissioner held that the appellants had been *"functus officio"* as receivers and managers but agreed to hear their counsel, Mr. Kanesalingam as *amicus curiae.* The Judicial Commissioner also held that the Customs submitted their claim for the amount of sales tax unpaid more than four years after they were notified by the appellants to do so and the claim was made only after the appellants had completed their duties as receivers.

The learned Judicial Commissioner in his judgment however absolved the appellants from any guilt of any breach of their duties as receivers and accordingly made an order to pay out the sum in court to the judgment creditor, the Intervenor, and towards party and party costs. The application of Mr. Kanesalingam was refused on the ground that he had no *locus standi* in the matter.

There are many grounds of appeal but central to all the grounds are the following fundamental issues namely whether the learned Judicial Commissioner was wrong in not taking any step under Order 49 rule 6 of the High Court Rules, 1980 and secondly whether the learned Judicial Commissioner was wrong in holding that the appellants were *functus officio* by February 28, 1981.

First on Order 49 rule 6 of the Rules of the High Court, 1980. This rule is adopted from the English equivalent. The words "it is brought to the notice of the court" in rule 6(1) taken from the corresponding English provision gave effect to the decision in *Roberts* v. *Death.*[1] It was held in that case that a garnishee order *nisi* ought not to be made absolute if it be suggested and if there is reasonable ground for so suggesting that the money sought to be attached is trust money.

The words "the court may order" in Order 49 rule 6(1) give discretion to the court to order that the person who claims to be entitled to the debt sought to be attached attend before the court and to state the nature of the claim with particulars thereof. Even if we regard in the instant case that it had been brought to the notice of the learned Judicial Commissioner that the Customs were interested in the sum garnished, one would not fail to notice that neither the Director General of Customs nor his representative was present before the court on the date set out in the notice sent out by the court. Thus if the notice dated January 2, 1983 sent out by the court is regarded as a notice under rule 6(1), it is clear from the record that the Customs did not respond to the notice and therefore no order could in any case have been made in their favour under Order 49 rule 6.

The second issue is the question of *locus standi* of the appellants. We do not agree with the learned Judicial Commissioner that the appellants had no *locus standi.* Mr. Kanesalingam, counsel for the appellants, was one of those to whom the notice of hearing dated January 2, 1983 was addressed by the court. The appellants were former receivers and the court was perfectly entitled to hear the appellants on any matter concerning the distribution of the money, subject of the garnishment order. It is however different altogether from saying that Mr. Kanesalingam had no *locus standi* to be before the learned Judicial Commissioner on behalf of the Director General of Customs as he was never retained by the Customs.

The undisputed facts show that the appellants had ceased to be receivers and that they had filed Form 60 under section 186(2) of the Companies Act, 1965 on February 28, 1981. The appellants

were accordingly *functus officio* as from that date and therefore no longer acting as receivers and managers on the date that they received the letter from the Customs stating the claim for unpaid sales tax.

Under the Companies Act, section 192 provides for the enforcement of duty of a receiver. Sub-section (1) provides that if a receiver or manager of a company makes any default in making or lodging any return account or other document or in giving any notice required by law and fails to make good the default within fourteen days after the service of a notice, the court may make an order directing him to make good the default. Section (2) provides that if it appears that any receiver or manager has misapplied or retained or become liable for any money or property of a company, the court may on the application of any creditor, compel him to repay or restore the property. It is clear to us that the appellants had neither made any default nor misapplied any property of the company to be liable under section 70 of the Sales Tax Act, 1972. They had complied with the requirement of giving due notice to the Director General of Customs. But unfortunately this notice was not responded to by the Customs until after four years later when the appellants had already ceased to act as receivers. A receiver would ordinarily be liable only if it be shown that he has not acted with perfect regularity or has not used a degree of prudence as would be expected from a private individual in relation to his own affairs. See also *Halsbury's* Third Ed. Vol. 32 para. 725.

Finally it would seem settled and accepted as such by Brett L.J. in *Roberts* v. *Death* that there is discretion of a court to make an order or not under Order 49 rule 6 as it is an exercise of an equitable power. In the circumstances of this case we do not think it was wrong for the learned Judicial Commissioner to have made the order as he did.

We will accordingly dismiss the appeal with costs. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Kanesalingam & Co.; H. H. Long & Co.; Shook Lin & Bok.*

PANG AH CHEE v. CHONG KWEE SANG

F.C. (Salleh Abas L.P., Wan Suleiman & Hashim Yeop A. Sani F.JJ.) September 4 & October 4, 1984]

[Johore Bahru – Federal Court Civil Appeal No. 326 of 1983]

Tort – Negligence – Fatal accident – Assessment of damages – Damages for loss of dependency – Number of years purchase – Prospect of marriage – Special damages – Proof of – Judicial notice – Evidence Act, 1950, ss. 56 & 57 – Civil Law Act 1956, ss. 7 & 8.

Damages – Fatal Accident – Assessment of quantum.

This was an appeal against the decision of Shankar J. reported at [1984] 1 M.L.J. 377. The deceased was killed when the motorcycle he was riding was knocked into by a motor car driven by the respondent. The mother of the deceased, the appellant, brought an action as administratrix of the deceased's estate and in her own capacity as dependant for damages under sections 7 and 8 of the Civil Law Act. In default of defence, an order was made precluding the defendant from defending the action. The learned President of the Sessions Court awarded $4,000/- for loss of life of which $2,000/- went to the deceased's father and the remainder merged with the appellant's dependency claim. The appellant was awarded $3,800/- for dependency claim and $7,920/- for future dependency, the learned President taking the dependency loss to be $100/- per month and the number of years purchase to be 17. The learned President also awarded $2,000/- for funeral expenses, $400/- for repairs to the motor cycle and $380/- for administrative and other expenses. On appeal the learned Judge reduced the dependency loss to $75/- per month and the number of years purchase to 7. The learned Judge disallowed the claim for special damages, for funeral expenses and repair to the motor-cycle as he held they were not proved. The appellant appealed.

Held: (1) the award of the learned President for the number of years purchase was far too excessive reflecting a wholly erroneous estimate. The prospect of marriage should have been considered and a smaller multiplier applied. The learned Judge was correct in reducing the number of years purchase to 7;

(2) the finding that a trial judge has erred in the direction of being too generous would not be itself constitute a matter to be appealed from and the appellate court is always slow to reverse the trial judge's decision on assessment of damages unless there are strong grounds for interference. The amount awarded by the learned Presisent for loss of dependency, that is $100/- per mensem, should be restored;

(3) there was sworn evidence in this case that the motor-cycle had been sent for repairs and certain payments had been made towards the repairs. These claims had been pleaded and particularised in the statement of claim and the learned appellate judge was therefore incorrect in disallowing the award of $400/- made by the learned President of the Sessions Court for this item;